IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S 46 of 2019

BETWEEN:

BVD17
Appellant

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

Part II: STATEMENT OF ISSUES

2. The appeal raises two issues:

   Issue 1: Whether the decision of the IAA is affected by jurisdictional error because the IAA failed to notify the appellant of the fact that it had received material that was subject to a certificate made under s 473GB(5) of the *Migration Act 1958* (Cth) **(the certificate material)**?

   Issue 2: Whether the IAA failed to consider the possible exercise of the discretion under s 473GB(3)(b) to disclose to the appellant any matter contained in the certificate material; and if so, whether that failure is affected by legal unreasonableness which in turn affects the decision and results in a conclusion that the decision of the IAA is affected by jurisdictional error?

Part III: SECTION 78B NOTICE NOT REQUIRED

3. Notice under s 78B of the Judiciary Act 1903 is not required.

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Part IV: CITATION OF DECISIONS BELOW

4. *BVD17 v Minister for Immigration and Border Protection* [2018] FCAFC 114.

5. *BVD17 v Minister for Immigration and Border Protection* [2017] FCCA 3046.

Part V: FACTS

6. The appellant is a citizen of Sri Lanka who arrived in Australia on 13 October 2012. On 31 March 2016, he applied for a Safe Haven Enterprise (Class XE) visa. The appellant claimed that he met the criteria for the grant of the visa under s 36 because there was a real chance that he might suffer serious or significant harm if returned to Sri Lanka, because he had been a captive of, and then escaped from the Karuna Group and because he is a Tamil who might be imputed to have supported the Liberation Tigers of Tamil Eelam (**the LTTE**).

7. A delegate of the Minister refused to grant the visa. Material before the delegate included a file described as 'Offshore Humanitarian Visa Assessment File of [appellant's brother]'.

8. The matter was referred to the IAA for review. The IAA accepted the appellant's claim that his adopted brother joined the LTTE in 1998 and was killed in 2000 whilst fighting for the LTTE, that their father had been killed as a result of the brother's actions, and that another brother had twice been abducted, in 2007 and 2009, by the Karuna Group and fled Sri Lanka (he is now living in Australia having been granted a protection visa). The IAA accepted that the appellant's mother had been detained by authorities in Sri Lanka resulting from their family's connection with the LTTE.

9. The IAA did not accept the appellant's claims that he himself had been abducted by the Karuna Group. This was said to be because:

    a. the appellant had been able to provide corroborative evidence to support the claims in relation to his family members, yet he did not supply corroborative evidence in relation to his own claimed experiences of past harm (AB 8, [17]);

    b. the IAA had access to the appellant's brother's protection claims (the brother now living in Australia), which apparently contained detailed information regarding the family's connection with the LTTE, but did not state that the

appellant had suffered past harm (AB 8, [18]) – the IAA found this omission to be "significant";

c. the appellant had given inconsistent evidence about the length of time he had spent in detention and was found to have been insufficiently detailed in his evidence of his claimed past harm (AB 8, [19]-[20]); and

d. the appellant had apparently not provided satisfactory evidence in relation to the claimed break out from place of detention by the Karuna Group, as well as the events which followed the break out (AB 8-9, [21]-[25]). (See also, AB 10, [29]-[30]).

10. The IAA stated that "[c]umulatively" (AB 9, [26]), the above matters led it to conclude that the appellant had "fabricated" the claim to have been abducted, detained and mistreated by the Karuna Group. The IAA considered that the lack of exposure to past harm at the hands of Karuna Group was highly probative – in the negative – of the prospect of the appellant facing such harm in the future (AB 11, [33]).

11. In light of the findings that the appellant had not experienced harm in the past, the IAA reasoned that he was not a person of interest to the Karuna Group and would not be exposed to a real chance of harm upon return to Sri Lanka on that basis.

12. Other aspects of the reasoning are not presently relevant, except to note that the findings of the IAA in paragraph 47 of its statement of reasons (AB 14) are directed to Sri Lankan authorities at the airport and not the Karuna Group (and so, a materiality issue could not arise therefrom).

13. There was before the IAA a certificate issued under s 473GB(5), in respect of a document titled:

> [CLD2016/23422774 – 81065261046 – GAN095 – Claims from Offshore File of Family Member – [appellant's brother's name] – (OSF2012/035490)] contained in PDF Portfolio [D-1-PRID 210587895 – [appellant's name] – CID: 81065261046].

14. It was accepted in the Court below that:

a. the summary of the appellant's brother's protection claims referred to by the IAA was part of certificate material (AB 8, [12]);

b. the certificate material had not been disclosed at any time to the appellant prior to the decision of the IAA (AB 8, [12]); and

c. the IAA had regard to the certificate material (AB 65, [36]).

15. Although the delegate had before her the brother's protection visa file (AB 55, [5]), in contrast to the IAA, the delegate did not place any significance on the supposed omission from the brother's file of reference to the appellant's experiences of past harm (AB 58, [13]).

16. Other than what appears on the face of the certificate, there is no evidence of any advice from the Secretary under s 473GB(2)(b).

Part VI: ARGUMENT

Ground 1

17. Having regard to the nature of the "review" being performed by the IAA,[1] it is necessary to mention four preliminary matters.

a. *First*, certificate material is "review material" under s 473CB(1)(c).[2] That is because certificate material can only be given to the IAA if it is done "in compliance with a requirement of or under this Act" (s 473GB(2)) and the only relevant requirement is under s 473CB (the provision of review material).[3]

b. *Second*, flowing from observations made in *Plaintiff M174*, certificate material might **be**, or might not be, "new information" depending on whether it was "before the Minister when the Minister made the decision". In this case, the

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[1] *Plaintiff M174/2016 v Minister for Immigration* (2018) 92 ALJR 481 (***Plaintiff M174***).

[2] *Minister for Immigration v BBS16* (2017) 257 FCR 111, [91] (***BBS16***).

[3] There is no reason to think that review material must be provided all at once.

brother's file was before the delegate and the certificate material was not "new information".[4]

c. *Third*, even putting aside s 473DE, an applicant enjoys some degree of participation in a review by the IAA under Pt 7AA.

i. An applicant can make submissions in relation to any issue arising from the delegate's decision, or in relation to any other issue arising in a review (implied in the function of performing a review).[5]

ii. An applicant can seek to persuade the IAA that it should get new information (implied by s 473DC(1)).

10 iii. An applicant can seek to advance new information to the IAA (implied by s 473DD(b)), subject to meeting the test under s 473DD(b).

iv. Allied to the above, an applicant can request that the IAA give to the applicant some or all of the review material so that the applicant might pursue (or better pursue) the matters in (i), (ii) or (iii) above. The IAA must have power to provide such material to an applicant as a derivative implication of the above, even though there is not an express power.

v. If they know of the possibility, an applicant can make submissions in relation to a possible exercise of the discretion under s 473GB(3)(b), or supply new information specifically addressing that question.

20 d. *Fourth*, an applicant will know of some of the information that is before the IAA from reading the delegate's statement of reasons (and noticing ss 473CB(1)(a) and (c)). However, they may be ignorant of material that was before the delegate if it has not been mentioned in the delegate's reasons,[6] or was not set out in any detailed way in those reasons or set out in a way that was insufficiently detailed for an applicant to understand what issues might arise

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[4] There is no suggestion that the delegate failed to comply with s 57 of the Act because the delegate did not draw any adverse inference from the appellant's brother's protection file and apparently did not think that any of its contents would be the reason, or part of the reason for refusing to grant the visa.

[5] *Minister for Immigration v CLV16* [2018] FCAFC 80, [45]-[56].

[6] A decision maker does not have to mention every piece of evidence that has been considered or is before them: *Applicant WAEE v Minister for Immigration* (2003) 236 FCR 593, especially [46]-[47].

from that information (as happened in this case). This is likely to arise frequently, given the narrow obligation under s 57, and because the obligation to give a statement of reasons does not require mention of every piece of evidence.

18. These observations reveal an important systemic feature of Pt 7AA, within the broader context of decision making in relation to protection visa applications.

    a. The regime permits an applicant a right to participate in the review, including the right to seek to change the course of the review.

    b. This right extends to any issue[7] in the review.

    c. However, that right to participate might be undermined by review material being referred to the IAA pursuant to s 473CB(1)(c) of which the applicant is unaware (as occurred in this case).

19. Even though one part of the Migration Act commands the IAA to conduct the review on the papers without accepting or requesting new information or interviewing an applicant (s 473DB), that command is expressly made subject to other parts of the Migration Act command the IAA to conduct the review in accordance with accepted understandings of the conditions on which Parliament confers procedural discretions upon administrative decision makers (discussed further in ground 2).

20. This requires attention to the appropriate exercise of the procedural powers available to the IAA. The principal procedural powers are the power to get new information for itself (s 473DC(1)), the implied power to invite an applicant to present argument or give new information, or both, in relation to an issue arising in the review, and where necessary, the implied power to give an applicant some or all of the "review material" to enable the applicant to do so in a meaningful way. These powers are implied from the existence of the obligation of the IAA to consider any submissions that are made to it[8] and the ability for an applicant to seek to advance new information.

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[7] The term "issue" is used in its English sense and not in the sense understood under ss 360(1) of 425(1).

[8] *Minister for Immigration v CLV16* [2018] FCAFC 80, [45]-[56].

Section 473GB

21. Sub-section 473GB(1) defines the conditions for certification under ss (5). It is materially identical to s 438(1).

22. Sub-section 473GB(2) assumes the obligation of the Secretary under s 473CB to give documents to the IAA, and then specifies that where certificate material is to be given to the IAA, the Secretary must notify the IAA that s 473GB applies to the certificate material. It also authorises the Secretary to give advice to the IAA about the significance[9] of the document or information.

23. Sub-section 473GB(3)(a) authorises the IAA to have regard to such material. It is a curious provision in light of s 473DB(1), requiring the IAA to consider review material (noting the certificate material is part of the review material). The rationale for the provision might be confirmatory (in an abundance of caution) of the obligation to consider review material under s 473DB(1) even though that material has a quality described in s 473GB(1).[10] Or, given that certificate material might be new information, the provision might authorise consideration of certificate material without meeting the test in s 473DD. It may be both. It is unnecessary to explore this further as it does not arise in this case.

24. Sub-section 473GB(3)(b) – the crucial provision in this appeal – confers a discretion upon the IAA to "disclose any matter contained in the document, or the information, to the referred applicant", subject to an obligation to have regard to any advice given by the Secretary under s 473GB(2).

25. This discretion is different to the implied power of the IAA to give to an applicant some or all of the review material (other than certificate material) discussed in paragraph 20 above. That is because:

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[9] It is not clear whether the term "significance" is limited to matters pertaining to the basis for the certification under ss (1) (noting the mention in s 473GB(3)(b)) or extends to the significance of the material to the substantive issues in the review. It is not necessary to explore this further.

[10] Perhaps, absent this sub-section, there might be argument about whether the IAA could consider certificate material, especially where it is subject to public interest immunity, given the usual evidentiary consequences of a successful claim to public interest immunity in judicial proceedings.

a. In considering whether to exercise the power under s 473GB(3)(b), the IAA would need to start from the premise that the Minister has correctly certified that the certificate material properly attracts public interest immunity or is otherwise confidential (otherwise, the certificate is invalid). That premise would be a powerful (though not conclusive) factor against disclosure.

b. The IAA would then need to consider the factors tending in favour of disclosure of some or all of the certificate material, having regard to the advice from the Secretary (which an applicant might wish to dispute) and to the adequacy of the protection(s) available under s 473GD.

c. Any decision to give certificate material to an applicant – which could only be done pursuant to s 473GB(3)(a)[11] – is qualified by these considerations, which are additional to the considerations that apply in relation to the general implied power to disclose (other) review material.

26. Sub-section 473GB(4) obliges the IAA to make a direction under s 473GD if any certificate material is given to an applicant (subject to criminal sanction for any breach of that direction).

27. Sub-section 473GB(5) confirms that the Minister has power to issue certificates for the purpose of s 473GB(1).

28. For the reasons given in paragraph 24-25 above, and analogously with s 438 in respect of Pt 7 reviews,[12] the existence of a certificate materially alters the procedural context in which the review is to be conducted, most significantly for this case, by changing the factors relevant to whether the IAA might give some or all of the certificate material to an applicant – transporting the consideration from the general powers discussed in paragraph 20 above to the specific context of s 473GB(3)(b).

29. There are four other points to note for general purposes, but they are not applicable in this case: (i) a certificate would truncate any obligation arising under s 473DE, if it applies; (ii) if s 473GB(3)(b) empowers the IAA to consider certificate material that is new information without meeting the test in s 473DD, the invalidity of a certificate

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[11] Applying the "*Anthony Hordern* principle".

[12] *Minister for Immigration v SZMTA* [2019] HCA 3.

would affect whether s 473DD is engaged; (iii) if the IAA was inclined to give certificate material to an applicant, invalidity of the certificate would affect the basis on which it might do so (ie, as certificate material under s 473GB(3)(b) or as ordinary review material), and would affect any direction made under s 473GD (including the consequential relevance for the criminal provision in s 473GD(4)); (iv) a valid certificate would support an exemption under Div 2 of Pt IV of the *Freedom of Information Act 1982* (Cth), which affects an applicant's rights under that enactment.

30. Unless an applicant is told of the existence of a certificate under s 473GB, they will not know of these important modifications. This deprives the applicant of the opportunity to advance argument or adduce new information relevant to the possible exercise of the discretion under s 473GB(3)(b), which is an opportunity that is contemplated by Pt 7AA but not otherwise available unless the applicant is told of the existence of the certificate. It follows that but for any exclusionary effect under s 473DA(1), *mutatis mutandis* the reasoning in *SZMTA* at [29]-[30], there is an implied obligation on the IAA to inform an applicant that there is before it a certificate made under s 473GB.

Section 473DA(1)

31. Section 473DA(1) provides:

> "This Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the Immigration Assessment Authority."

32. The provision makes two assumptions:

    a. It assumes that but for s 473DA(1), the lawful performance of a review under Pt 7AA would require compliance with the requirements of the hearing rule.

    b. It assumes that some of the requirements of the hearing are found in "This Division, together with sections 473GA and 473GB". This assumption arises from the contextual observation that "This Division" – being Div 3 of Pt 7AA –

and s 473GB are the only provisions in Pt 7AA where there is found any of the requirements of the hearing rule.[13]

33. With these assumptions in mind, s 473DA(1) then expressly states that the requirements of the hearing rule as found in "This Division, together with sections 473GA and 473GB" are taken to be exhaustive of all of the requirements of the hearing rule. The effect of this language is, metaphorically, to encircle the requirements of the hearing rule as are found in Div 3 of Pt 7AA and s 473GB, and to deem that compliance with those requirements is compliance with the hearing rule.

34. It follows that so much of the requirements of the hearing rule as are found in "This Division, together with sections 473GA and 473GB" continue to apply in relation to a review under Pt 7AA and qualify the lawful performance of the review function.

35. Put another way, s 473DA does not cut down any "requirement" of the hearing rule if it arises from s 473GB. Section 473DA takes s 473GB "as it finds it", and then works, relevantly, by stipulating that the IAA is not required to comply with any *other* requirement of the hearing rule.

36. Authority to the contrary in the Federal Court is wrong (the leading case is *BBS16*, [96]-[100]).[14] The appellant's argument to this Court was not made in *BBS16*, and in any event, *BBS16* predates *SZMTA*. There is no further need to address *BBS16* (or any case that has applied it).

37. This argument does not depend on any analogy with s 422B. That provision is materially different and does not assist the resolution of this case.

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[13] Section 473GA is also mentioned in s 473DA(1), but the purpose of this reference is not clear and does not need to be explored in this case.

[14] *BBS16* is wrong in other respects. Paragraphs 92-93 wrongly conclude that certificate material cannot be "new information"; as explained in M174, that depends on factual questions concerning the material that was before the delegate. Paragraph 96 wrongly assumes that the IAA will always have a discretion as to whether it considers the certificate material; but the correct position is that if the certificate material is not new information it must always be considered as part of the review material and if it comprises new information, it must at least be considered for the purpose of s 473DD.

Conclusion on ground 1

38. As there is an implied obligation upon the IAA to have informed the appellant of the certificate made under s 473GB, and the IAA did not comply that obligation, legal error is shown. The error materially affected the outcome and is jurisdictional error.

39. The failure to inform the appellant of the existence of the certificate material deprived him of the opportunity to take steps to seek to persuade the IAA to give him the certificate material pursuant to s 473GB(3)(b).

40. That was the loss of a valuable procedural opportunity.[15] If the appellant had known of the existence of the certificate material, bearing in mind that he was known to be in contact with his brother in Australia, the Court can take notice that there was a realistic possibility that he might have advanced argument or new information (including perhaps from the brother) which may have led the IAA to exercise the power under s 473GB(3)(b). Accepting that there was a realistic possibility that this power might have been exercised favourably to the appellant, the Court can take notice that it was also realistically possible that the appellant might have been able to give argument or new information about the supposed omission of detail from the brother's file, which may have persuaded the IAA not to reason as set out at AB 8, [18]. In turn, that may have affected the "accumulation" of factors that led to disbelief of his claim to have suffered past harm, and if he was believed in relation to that claim, the overall outcome may have been different (see AB 9 [26]).

Ground 2

Legal unreasonableness and Part 7AA

41. The principles of legal unreasonableness are settled by *Minister for Immigration v Li* (2013) 249 CLR 332 and *Minister for Immigration v SZVFW* (2018) 92 ALJR 713.[16]

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[15] See, by analogy, *WZARH v Minister for Immigration* (2014) 316 CLR 389.

[16] Although, the precise verbal formula in which these principles are to be expressed may not be: see *Minister for Immigration v SZVFW* (2018) 92 ALJR 713, [53], [59]-[60] (Gageler J); *DPI17 v Minister for Immigration* [2019] FCAFC 43, [110] (Mortimer J).

For reasons discussed in *Stretton* and *SZVFW*, it is not possible to state any complete or general formula for the assessment of the *standard* of legal unreasonableness.

42. Accepting that the standard of legal unreasonableness is controlled by the statutory scheme in issue, in this case a significantly influential feature of the regime is that the IAA must perform the review on the papers and without accepting or requesting new information or interviewing the applicant (s 473DB). Another influential feature is that the deliberate modification of the rules of procedural fairness apply in a context where the review follows automatically upon the conclusion of a substantial decision-making process to which attach many of the rules of procedural fairness (Subdiv AB of Div 3 of Pt 2). Thus, eg, although applicants would not usually have a hearing before the IAA, they will usually have been interviewed by a delegate. Any judgment of unreasonableness under Pt 7AA must take account of the fact that some degree of "fairness" has been afforded at an earlier stage.

43. There are other aspects of the regime, understood against the background of settled principles of administrative law, that are also relevant:

    a. the IAA must reach the correct[17] decision *at the time of the IAA's decision*;

    b. the review is to be conducted based on the review material *and such new information as is admitted for consideration*;

    c. the subject matter of the review requires attention to facts that are inherently changeable, often rapidly so, and there is a time gap between the delegate's decision and the decision of the IAA (and not just because of changes in country information) (and the subject matter of the review contemplates the possibility of *sur place* claims);

    d. the possibility that an applicant may be unaware of the existence of material relevant to an IAA review, and may not have been afforded a reasonable opportunity to address that information at any earlier stage.

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[17] In the sense discussed in *Drake v Minister for Immigration* (1979) 24 ALR 577, 589. The substantive decision of the IAA does not involve any discretionary element, and it is not relevant to have regard to the "preferable" aspect of this formulation.

44. To these matters should be added the observations made in paragraphs 18-20 above.

45. Further, and analogously with the reasoning of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 44-45, the scope, subject matter and purpose of the Migration Act, including Pt 7AA, implies that the IAA will perform its function on the basis of all relevant information available to it, including where that requires the exercise of some procedural power available to the IAA.[18]

46. These matters are especially important as the review under Pt 7AA commences "automatically" upon referral from the Secretary (and not application by an applicant), and because a review is not done just for the benefit of an applicant (although there clearly is such a benefit) – there is also a need to ensure that Australia meets its obligations to other nations not to *refoul* people in certain circumstances (in accordance with the interpretation of those obligations specified by Parliament in the Migration Act), which concerns Australian society at large.

47. The procedural discretions empower the IAA to obtain relevant information which it does not have in the review material. One obvious situation where the IAA would know that there may exist relevant information, but which is not before it, is where the IAA knows that an applicant has not been provided with an opportunity at any stage to respond to adverse information personal to their claims. In this situation, the relevant information that is not before the IAA is any answer that the applicant might give to the adverse information. Such information is likely to be easily available, upon request from the applicant. Indeed, if it is not available, that too would be useful information as it may justify an inference adverse to the applicant.

48. Where this situation arises, the IAA could not perform a "review" as contemplated in Pt 7AA without at least *considering* the possible exercise of a procedural discretion to enable it to obtain relevant information. That is legal unreasonableness, because it falls beneath the minimum standard expected by the Migration Act, when it is understood in its full context with reference to administrative law principles and broader notions of legal traditions and history, as discussed above.

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[18] There is also analogy, to a lesser extent, with the discussion in *Minister for Immigration v SZIAI* (2009) 259 ALR 429 at [26] with respect to any "duty to inquire" on the part of administrative decision makers.

49. Bearing in mind that the discretion in issue is a *procedural* discretion, the suggestion that there is a link between legal unreasonableness and procedural fairness,[19] also provides some useful guidance in the judgment of unreasonableness. A fair procedure would require that the person has a reasonable opportunity to respond to any information adverse to their claims, at least insofar as it was personal to them and not general country information. There is consonance between the outcomes of unreasonableness in the failure to consider the exercise of a procedural discretion and procedural unfairness if the requirements of the hearing rule applied. Where the former is shown, one would usually expect the latter. However, the link does not work in the other direction – a conclusion of legal unreasonableness affecting the exercise or non-exercise of a procedural discretion will not be shown just because one would have expected a conclusion of procedural unfairness if the requirements of the hearing rule applied. But it is still useful – if an allegation of unreasonable conduct would not have been procedurally unfair if the requirements of the hearing rule applied, the allegation would fail. That suggests that the standard of legal unreasonableness is influenced by, although not controlled by, general notions of procedural fairness.

The decision of the IAA in this case is affected by legal unreasonableness

50. The Federal Court did not accept that the IAA had failed to consider whether to exercise the power under s 473GB(3)(b). That conclusion is wrong.

51. Although it is true that the omission to mention some matter in a statement of reasons does not immediately justify an inference that the IAA failed to consider that matter,[20] that inference should have been made in this case.

52. The Federal Court did not pay attention to the fact that the IAA did not confine itself in the statement of reasons only to those matters which it was obliged to address – it specifically addressed the procedural history of the matter and the information before it (AB 4 [1]-[3]). Accepting that the IAA addressed more than the minimal requirements, it should be understood as having chosen to address everything that it thought was relevant to the exercise of its power, procedural and substantive. If that is

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[19] *Li*, [92]; See also *DPI17*, [78]-[95].

[20] *Minister for Immigration Yusuf* (2001) 206 CLR 323, [69] (Gummow and Hayne JJ).

accepted, because there is no reference to the discretion under s 473GB(3)(b), it should be inferred that the possible exercise of that discretion was not considered.

53. That conclusion is fortified by the following matters.

54. The IAA found that the appellant had fabricated a crucial event in the context of his claim to be owed protection. This was in circumstances where most of his other claims had been accepted, which claims objectively tended to increase the probability that the appellant was, as claimed, a person with an imputed LTTE connection (his father was killed for such an imputed LTTE connection). The finding of fabrication was significantly influenced by the fact that the appellant's brother had not mentioned in his own (successful) claims to be owed protection that the appellant had suffered harm. This finding had not been made by the delegate and there was no way that the appellant might have anticipated that the finding was "open on the materials" because he had never had access to those materials (and the IAA knew this to be so).

55. The omission was probative only if it was unexplained. However, the IAA could not justifiably infer that the omission was unexplained because the appellant never had the opportunity to explain that omission, and the IAA ought to have known that the appellant may well be able to provide an explanation for the omission. If the appellant could do so, that would have been highly relevant to the review.

56. These matters show that there was great force in the considerations favouring the exercise of the discretion under s 473GB(3)(b), and objectively, any such exercise was directed to an important issue in the review. If the IAA had considered the possible exercise of the discretion and formed some reason for not exercising it favorably to the appellant, which must have been sufficiently strong to outweigh the forceful considerations in favour of its exercise, it is very unlikely that that reason would not have been recorded in the statement of reasons in this case.

57. Further, because whatever the resolution of ground 1, it cannot be doubted that the IAA had power to give the certificate to the appellant, the fact that it did not disclose the existence of the certificate to the appellant tends to suggest that it did not consider the possible exercise of the discretion under s 473GB(3)(b). That is because one would expect that if the IAA, acting as a conscientious decision maker, had turned its mind to the possible exercise of the discretion under s 473GB(3)(b) it would have

realized that its assessment of that discretion would have been informed by any argument or new information that the appellant might be able to supply (including because the IAA knew that the appellant had been in contact with his brother in Australia as recorded in the delegate's decision record).

58. For these reasons, the Federal Court was wrong not to infer that the IAA had not considered the possible exercise of the discretion under s 473GB(3)(b).

59. Accepting that the possible exercise of the discretion was not considered, the seriousness of the subject matter of the review and the importance of the certificate material, weighed against the ease of the function of considering the exercise of the discretion, justify a conclusion that the failure to so was legally unreasonable in this case. That failure to consider the discretion disabled the IAA from recognizing that there was a significant lacuna in the information before it, a lacuna which was capable of being filled if the IAA chose to exercise the discretion. But not even considering whether to do so falls beneath the minimum expected of the IAA.

60. This was material to the outcome of the decision for the same reasons set out in paragraph 40 above.

No allegation of unreasonable failure to exercise the discretion under s 473GB(3)(b)

61. If the appellant has not shown that the IAA did not consider the possible exercise the discretion under s 473GB(3)(b), the appellant could not succeed in showing that any decision not to exercise the power under s 473GB(3)(b) was affected by legal unreasonableness. As noted above, one consideration that the IAA would have been entitled to give weight to is the confidential quality of the certificate material. The appellant has never seen the certificate material and cannot assert in this Court that the considerations relating to such confidentiality as would tend against disclosure were so slight that it was legally unreasonable not to disclose the certificate material.

Part VII: ORDERS SOUGHT

The appellant seeks orders as set out in Notice of Appeal (AB 74-75).

Part VIII: TIME FOR ORAL ARGUMENT

The appellant estimates that he requires 75 minutes for the presentation of oral argument.

Dated: 5 April 2019

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